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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-180005 DATE: December 8, 1977

MATTER OF: Headquarters XVIII Airborne Corps and Fort Bragg - Recoupment of Union Dues - Arbitration Award

DIGEST: Federal Labor Relations Council seeks decision on whether arbitration award is valid which requires agency to pay union the amount that agency had deducted from periodic dues withholdings when it discovered it had failed to terminate dues withholding of an employee who had been promoted outside bargaining unit. Arbitrator construed agreement as not permitting setoff but refused to consider relevant laws and regulations that impact on agreement. Arbitrator's award is inconsistent with applicable laws and regulations and may not be implemented.

The Federal Labor Relations Council (FLRC) has requested our decision as to whether an arbitration award violates applicable law. The American Federation of Government Employees has also requested that we decide this matter. The Federal Labor Relations Council has captioned the case Headquarters, XVIII Airborne Corps and Fort Bragg and American Federation of Government Employees, Local 1770, AFL-CIO (Murphy, Arbitrator), FLRC No. 76A-145. The issue presented is whether, where dues allotments had been erroneously paid to the union, the agency was entitled to recover the same amount by setoff from a later dues allotments payment to the union.

The facts in this case are not in dispute and may be summarized as follows. Mr. Robert A. Johnson, a Fort Bragg employee and a dues-paying member of Local 1770, was promoted out of the bargaining unit to a supervisory position on September 10, 1972. At that time, Mr. Johnson's agency should have terminated his union dues allotment pursuant to 5 C.F.R. § 550.322(c) which provides that:

> "* * * an agency shall discontinue paying an allotment when the allotter is * * * promoted within the agency outside the unit for which the labor organization has been accorded exclusive recognition * * *."
> (Emphasis added.)

The agency, however, due to an error by a payroll clerk in the Finance Office, did not terminate Mr. Johnson's checkoff but continued to deduct his union dues allotment from his pay and pay it over to the union until September 1975, when the error was discovered. The agency notified Mr. Johnson and Local 1770 of the error and made the necessary adjustment by refunding the erroneous deductions in the total amount of $170.15 to Mr. Johnson and concurrently deducting an equal amount from the dues payment made to Local 1770 for the payroll period of October 5-18, 1975. The adjustment was made pursuant to para. 10-118a, Army Regulations (AR) 37-105, that provides as follows:

> "[a]djustment to correct amounts erroneously withheld or where through error withholdings have not been made from the salary of a currently employed individual will be made on a subsequent payroll on which the employee's name appears."

During the period that Mr. Johnson's dues checkoff were erroneously made, he received Statements of Earnings and Leave indicating that his checkoff was still in effect. Johnson made no effort to revoke his checkoff authorization nor to resign from the union. He continued to receive the union newspaper and other publications, and also had the use of a union member purchase discount card. Even after the agency notified him of the error, Johnson did not request a refund of the dues, either from the agency or from the union.

The union filed a grievance on November 7, 1975, alleging that pursuant to section 7, Article XXXVI of the collective-bargaining agreement between the agency and the union, the agency was not permitted to deduct the $170.15 from the amount due the union for that biweekly pay period. In this connection, section 7 provides as follows:

> "Section 7. Within five (5) working days after each bi-weekly pay period, the Finance and Accounting Office, Civilian Pay Section, will furnish the Union a summary, in duplicate, which will identify the Union, list each member of the Union who has authorized a voluntary allotment, the amount of the fee of $.02 per employee per pay period for providing the withholding service and the net amount

> remitted to the Union. A single check covering the net amount due the Union will be forwarded within five (5) working days after each bi-weekly pay day. The check will be forwarded to a specific Union Officer designated by name, in writing, by the Union."

The grievance was submitted to arbitration and hearings were held on October 1, 1976, at Fort Bragg, North Carolina. The agency contended that termination of Mr. Johnson's dues checkoff was required at the time of his promotion out of the unit on September 10, 1972, pursuant to 5 C.F.R. § 550.322(c) and that when the allotment was erroneously continued and eventually discovered, corrective action in the form of immediate pay adjustments were mandated by para. 10-118, AR 37-105. The agency also contended that our holdings in Aberdeen Proving Ground (APG), B-180095, October 1, 1974, and Reconsideration of APG, 54 Comp. Gen. 921 (1975) were directly applicable to this case. The APG decisions held that immediate agency recoupment of previous erroneous dues overpayments to the union was permitted, despite an agreement provision requiring that all dues deducted by the agency for each pay period less a fixed collection charge were to be paid over to the union. Finally, the agency contended that if the arbitrator ordered it to pay the union the disputed $170.15, it would be unable to comply with the award because no appropriation existed from which such payment could be made pursuant to 31 U.S.C. § 628.

In deciding this grievance, the arbitrator assumed that he had no power to interpret laws, regulations and administrative decisions that impact on the provisions of the agreement. The arbitrator stated that he could only interpret and apply the provisions of the agreement, and that since the law and regulations were not a part thereof, he had no authority to construe the law and regulations. He added, that if the regulations were to be given legal precedence over the contract, someone else would have to act to accomplish that result.

The agreement, according to the arbitrator, in section 7 required the agency to pay over the "net amount due" to the union for each pay period, and did not authorize the agency to unilaterally initiate a refund to an employee and then reimburse itself from the amount due the union for the next payroll period. He concluded that the agency

in making the $170.15 deduction had violated the agreement and he directed the agency to pay the amount of $170.15 to the union.

In so deciding, the arbitrator concluded that the APG decision is distinguishable and not controlling in this case. We disagree. We believe that the issues in the two cases are very similar and that our APG holding in B-180095, October 1, 1974, and 54 Comp. Gen. 921 (1975) are directly in point here and require that the arbitrator's award be invalidated.

The APG decision involved an agency's unilateral action in deducting $80.33 from its payment of dues to the union to recover a previous overpayment of dues resulting from the agency's failure to terminate an allotment when an employee had been promoted out of the bargaining unit. Although there are differences between the collective-bargaining agreements in the two cases, these differences are immaterial because the subject matter is controlled by Civil Service Commission regulations and by Executive Order 11491, both of which provide that a dues allotment terminates when an employee is transferred out of the bargaining unit.

Because the APG case is so similar to the Fort Bragg case before us, we suspended action on the present case, and so notified the Federal Labor Relations Council by letter of September 27, 1977, pending resolution of the union's suit in the Court of Claims on the APG matter.

On October 19, 1977, the Court of Claims decided the APG case in Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO v. United States, Ct. Cl. No. 172-76. The court's opinion first cites the Department of Defense directive, the Executive order, and the Civil Service Commission regulation, all of which require that the union dues allotment must be discontinued when the employee is transferred out of the bargaining unit. The opinion then quotes section 12(a) of Executive Order 11491 which provides that each agreement between an agency and a union is subject to existing or future laws and regulations of appropriate authorities. The court then concluded as follows:

> "Since the law, as provided in the regulations, required a termination of the dues allotment upon Mr. Wright's transfer, the payments made by the Government thereafter were both erroneous and illegal."

As to the remaining issue of the legality of the Government's self-help recovery of the erroneous overpayments, the Court of Claims found that the means used were not only authorized by the regulations but also sanctioned by the well-settled rule of law allowing the Government to recover by setoff or otherwise sums illegally or erroneously paid.

In addition the Court of Claims made it clear that Federal laws and regulations are controlling in Federal sector arbitration by the following rationale (slip opinion, pp. 9-10):

> "In an effort to avoid the difficult obstacle presented by the cited regulations, plaintiff maintains that judicial review of an arbitrator's decision is a limited one and that the court must enforce an arbitrator's award where the arbitrator does not 'exceed the scope of his authority.' In support of this position, plaintiff cites a long line of cases, including United Steelworkers of America v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir. 1974), reversing 339 F. Supp. 302 (N.D. Ala. 1971); United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). However, we reject plaintiff's argument because we find that the authorities cited are inapposite to the facts of this case. See Byrnes v. United States, Ct. Cl. No. 354-75, order of February 4, 1977 at p. 2, 213 Ct. Cl. ___ (1977).
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> "In the first place, the cases cited by plaintiff all concern labor arbitration awards made in the context of private labor disputes. Those decisions focus on the Congressional intent, as reflected in the Labor-Management Relations Act, 29 U.S.C. § 141, et seq., 61 Stat. 136, that industrial labor disputes be settled by arbitration. However, the definition of 'employer' in the Labor-Management Act specifically excludes the United States, 29 U.S.C. §§ 142(3) and 152(2). Consequently, those cases, which limit judicial review and accord finality to decisions of arbitrators, including their construction of provisions

> of collective bargaining agreements, have no application to an arbitrator's decision made pursuant to a collective bargaining agreement between the Government and a union.
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> "In the second place, we cannot agree with the plaintiff's contention that the arbitrator 'did not exceed the scope of his authority' in awarding the $80.33 to the union. On the contrary, we find that he based his decision on a literal reading of one section of the collective bargaining agreement and ignored laws and regulations which were an integral part of that agreement and binding upon him as equally as on the parties. Since the decision was contrary to law, it cannot be upheld."

In the instant case the law and regulations governing employee dues checkoff and adjustment of payroll accounts where erroneous deductions occur are the same as in the APG case. Pursuant to 5 C.F.R. § 550.322(c) an agency is required to discontinue paying the union dues allotment of an employee when he is promoted within the agency outside the unit for which the labor organization has been accorded exclusive recognition. Because Mr. Johnson was promoted outside the bargaining unit, the agency was absolutely required to terminate paying his allotment on September 10, 1972. However, because of an administrative error, the allotment was continued until September 1975 and Mr. Johnson's aggregate compensation for the period, to which he was legally entitled, was reduced by $170.15. Upon discovering that union dues had been erroneously withheld from Mr. Johnson's pay, his agency complied with the mandatory provisions of para. 10-118, AR 37-105, governing adjustments for union dues deductions. That paragraph requires that the agency make an adjustment on a subsequent payroll to correct amounts erroneously withheld. Then, having reimbursed the employee for funds erroneously withheld, it was necessary for the agency to make an adjustment in the union's account to correct the past overpayments. This it did by a one-time recoupment which was recognized as an appropriate measure to adjust such accounts in our Aberdeen Proving Ground decisions B-180095, October 1, 1974, and 54 Comp. Gen. 921 (1975). As noted above, those decisions have recently been upheld in Lodge 2424, International Association of Machinists and Aerospace Workers, AFL-CIO v. United States, Ct. Cl. No. 172-76, supra.

Accordingly, we conclude that the arbitrator's award is inconsistent with the applicable regulations and, therefore, may not be implemented.

Deputy Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-180095

December 8, 1977

Mr. Henry B. Frazier, III
Executive Director
Federal Labor Relations Council

Dear Mr. Frazier:

We refer to your letter of April 26, 1977, requesting a decision from our Office on an arbitration award captioned: Headquarters, XVIII Airborne Corps and Fort Bragg and American Federation of Government Employees, Local 1770, AFL-CIO (Murphy, Arbitrator), FLRC No. 76A-145

As you were advised by letter of September 27, 1977, we suspended any action in this matter pending a decision by the Court of Claims in Lodge 2424, International Association of Machinist and Aerospace Workers, AFL-CIO v. United States, Ct. Cl., No. 172-76. On October 19, 1977, the Court of Claims rendered its decision and upheld the Government's right to recover by set off union dues erroneously paid to a union by an agency.

Enclosed is our decision of today which holds that the arbitration award is inconsistent with applicable laws and regulations and may not be implemented.

Sincerely yours,

Comptroller General
of the United States

Enclosure